

October 1, 2009

Corbin R. Davis  
Clerk of the Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

Re: ADM File No. 2009-11

Dear Mr. Davis

Unlike several colleagues, and the Attorney General, I write in support of the proposed amendment of MCR 6.302(C)(1)---but not as written. I believe the current proposal includes a drafting error that accomplishes an unintended result, and that a “tweaking” of the proposal, in much the manner suggested by the esteemed and perceptive Judge Donald Johnston, would accomplish a desirable result and obviate virtually all of the objections to the proposal.

The proposal is that “All discussions regarding a defendant’s plea must take place in open court and be placed on the record.” But I do not think this is what is intended. Previously the court had published a proposal that would have precluded judicial involvement in the plea-bargaining process, consistent with the federal practice, that of many states, and as recommended by the American Bar Association. At the public hearing, several justices, as I recall, inquired about the possible alternative of requiring all negotiations *involving the judge* to be on the record. Though the court did not adopt the ABA standard---which I think is regrettable---I believe the proposal now out for comment is intended to accomplish the end of making sure that all plea negotiations involving the judge be placed on the record for possible later scrutiny. The language of the proposal sweeps more broadly, and virtually all of the comments opposing it do so because it would require all plea discussions *between defense counsel and the prosecutor* to be in open court and on the record, something I do not believe is required anywhere, and which I do not believe was intended here. If the proposal is tweaked in the way suggested by Judge Johnston, I believe all, or almost all, of the objections disappear.

Judge Johnston suggests tweaking the proposal to read “All discussions between counsel, defendant, and the court must be in open court and placed on the record.” Language of this sort making clear that it is judicial involvement that triggers the “on the record” requirement cures the difficulty seen by most commentators. Though I favor precluding judicial involvement in plea negotiations, and won’t repeat my comments made to the previous proposal here, if judicial

involvement *is* to be permitted I think the “on the record” requirement a valuable one---I am not sure that these discussions need be in open court. however, though I have no strong opinion about it.

If the proposal is amended in the manner suggested by Judge Johnston or in some similar fashion, then I think many who have written to oppose it could and would support it; at the very least, their reasons giving for opposition would disappear.

Very truly yours,

Timothy A. Baughman